RECORD AND BRIEFS

Nos. 16-74, 16-86, 16-258

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IN THE

Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL., *Petitioners*,

v.

MARIA STAPLETON, ET AL., *Respondents*.

SAINT PETER'S HEALTHCARE SYSTEM, ET AL., *Petitioners*,

v.

LAURENCE KAPLAN, *Respondent*.

DIGNITY HEALTH, ET AL., *Petitioners*,

v.

STARLA ROLLINS, *Respondent*.

On Writs of Certiorari to the Third, Seventh, and Ninth Circuits

BRIEF OF THE ILLINOIS CONFERENCE OF THE UNITED CHURCH OF CHRIST, THE COUNCIL FOR HEALTH AND HUMAN SERVICE MINISTRIES, THE METROPOLITAN CHICAGO SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA, AND LUTHERAN SERVICES IN AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the church plan exemption set forth under the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. §§ 1002(33), 1003(b)(2)) applies so long as a pension plan is maintained by an otherwise qualifying church-affiliated organization, or whether the exemption applies only if, in addition, a church initially established the plan.

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INTEREST OF *AMICI CURIAE*[1]

Pursuant to Supreme Court Rule 37.3(a), the Illinois Conference of the United Church of Christ (Illinois Conference), the Council for Health and Human Service Ministries (CHHSM), the Metropolitan Chicago Synod of the Evangelical Lutheran Church in America (MCS), and Lutheran Services in America (LSA) respectfully submit this brief as *amici curiae* in support of Petitioners.[2]

The Illinois Conference. The Illinois Conference is a United Church of Christ (UCC) covenant community and one of 38 conferences of the UCC. The Illinois Conference is in turn made up of five associations and 271 local congregations, having more than 70,000 members, and is the third largest conference of the UCC.

The Council for Health and Human Service Ministries. CHHSM is a membership organization of health and human service ministries that have been recognized by one or more conferences of the UCC. CHHSM's members operate more than 360 communities and programs "committed to advancing the healing and service ministry of Jesus Christ." *About Us*, CHHSM, http://www.chhsm.org/about/ (last

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party and that no person or entity other than *amici*, its members, or its counsel has made any monetary contribution to the preparation and submission of the brief. Pursuant to Supreme Court Rule 37.3(a), *amici curiae* further certify that counsel of record for all parties have consented to its filing.

[2] The authors wish to acknowledge the contributions to the analysis in this brief of Robert W. Tuttle, the David R. and Sherry Kirschner Berz Research Professor of Law and Religion at The George Washington University Law School.

visited Jan. 22, 2017). CHHSM's members range in size from small care centers to large hospital networks; collectively, CHHSM's members serve more than a million people annually. *Id.*

Metropolitan Chicago Synod. MCS is one of 65 synods within the Evangelical Lutheran Church in America (ELCA). It is comprised of more than 180 congregations, with a combined total of more than 85,000 members. MCS's congregations are spread across four counties in Northeastern Illinois. As a synod within the ELCA, MCS provides a range of support to its congregations, and also engages in partnerships with a variety of other church institutions, including seminaries, campus ministries, and social ministry organizations (SMOs). *Who We Are*, MCS, http://www.mcselca.org/who/ (last visited Jan. 22, 2017).

Lutheran Services in America. LSA is one of the largest health care and human services networks in the country, representing 300 Lutheran nonprofit organizations of all sizes serving six million people annually. LSA, a faith-based network of Lutheran SMOs, is a joint undertaking of the ELCA and the Lutheran Church–Missouri Synod (LCMS). All SMOs that are members of LSA must be affiliated with the ELCA or recognized by the LCMS.[3]

Despite significant differences in church polity, the *amici* share a common religious understanding of social ministry. Care for those in need is not merely part of the church's work in the world; social ministry is part of the church and reflects a fundamentally

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[3] Because Petitioner Advocate Health Care Network (Advocate) is affiliated with the ELCA, not the LCMS, further references to LSA and its member church bodies will exclude mention of the LCMS.

religious mission to answer God's call to love and serve our neighbors. The *amici* understand that religiously-affiliated SMOs are within, and not extensions of, the broader church.

For non-hierarchical churches like the UCC and the ELCA, the work of social ministry typically occurs in organizations that are not directly controlled by a congregation or other denominational body. Yet those ministries almost invariably arose from one or more congregations or denominational bodies that saw an unfilled need in their community. The work of these church ministries is no less religious because it arises from local congregations or regional bodies and their diverse constituents. For many faith groups, and for the *amici* here, the work of the church-affiliated SMOs *is* the work of the church, an expression of the religious creed and calling of the church, and thus part of the church—whether or not a "church" established the social ministry's pension plan. The Circuit Courts below failed to take this into account when they held that a plan must be established by a church to qualify for the church plan exemption.

SUMMARY OF ARGUMENT

The Circuit Court decisions under review, denying the church plan exemption from ERISA to plans established and maintained by SMOs "controlled by or associated with a church," merely because the plan was not also initially "established" by a church, may seem to some (and certainly seemed to the Circuit Courts) to be merely a routine technical issue of statutory construction. Far from routine, these decisions have major implications for religious organizations, their affiliated social ministries, and the hundreds of thousands of people served or employed by those social ministries. Requiring church-affiliated SMOs to enlist

a brick-and-mortar "church" or denominational body to establish the SMO's pension plan is incompatible with the statutory text, the legislative history, and more than three decades of interpretation by the regulatory agencies charged with interpreting and enforcing ERISA. It is also incompatible with the way that many churches and their affiliated SMOs function.

Although the UCC and the ELCA have different church polities, they share a commitment to the distribution of church authority, rather than its centralization. For the UCC, authority in the church is located in each body of believers that enters into covenant with each other. And the same is true of church-affiliated social ministries. While all church bodies are in covenant with another to seek God's will, each body has authority over its own affairs. Thus, the choice of pension arrangements for employees of church-affiliated social ministries such as hospitals, schools, and old age homes belongs to the SMO, not to the UCC.

Under the ELCA Constitution, authority is shared among congregations, synods, the church-wide organization, and a range of other affiliated entities. Through this distributed authority, each constituent or affiliated entity has a shared mission, but distinct functions and the power to carry out those functions within the boundaries of the ELCA Constitution and the entity's corresponding governing documents. In the context of social ministry, the recognition of those distinct functions typically means that a church-affiliated entity has incorporated separately from other parts of the church body, and only after incorporation (and perhaps years of slow expansion) adopts a pension plan.

In denominations with distributed authority, the work of social ministry may—and often does—occur in organizations that are not governed by a congregation or other denominational body. Instead, these SMOs maintain covenantal relationships with congregations or denominational entities. The faith groups' considered and sincere affiliation with these SMOs deserves serious respect. The Circuit Courts' requirement that a church *must* establish the plans that cover employees of church-affiliated organizations is incompatible with the faith-based practices of non-hierarchical churches.

The Circuit Courts' interpretation is also incompatible with the statutory text and legislative history of the church plan exemption. ERISA defines a "church plan" as a plan "established and maintained . . . by a church," and then clarifies that a "plan established and maintained . . . by a church . . . includes a plan maintained by an organization . . . [that] is controlled by or associated with a church." 29 U.S.C. §§ 1002(33)(A), (C)(i). This broad definition of a church plan is supported by the legislative history, which makes clear that Congress amended the definition of "church plan" in 1980 in order to recognize the actual practice of many faith traditions in carrying out their mission through a variety of church-affiliated organizations.

A broad interpretation of the church plan exemption is also appropriate given the uniform interpretation of the Internal Revenue Service (IRS), the Department of Labor (DOL), and the Pension Benefit Guaranty Corporation (PBGC), which, for nearly 35 years, have consistently recognized that plans established by church-affiliated organizations qualify for the church

plan exemption. The agencies' longstanding interpretation of the church plan exemption is entitled to deference, particularly given the immense reliance interests that have developed as a result of agency practice. The agencies' interpretation is also entitled to deference because it avoids the serious constitutional doubts engendered by the Circuit Courts' church-establishment requirement, which not only creates a preference for certain types of ecclesiastical arrangements, but also requires significant, and constitutionally problematic, government inquiry into whether any particular SMO is "religious" enough to be considered a "church."

Finally, the interpretation adopted by the Circuit Courts creates a number of burdens for church-affiliated organizations without providing additional meaningful protections for employees. Church plans that are exempt from ERISA are still subject to a number of federal and state regulations, and there is no evidence suggesting that ERISA-exempt church plans have failed on a widespread basis. If church-affiliated organizations that have established their own plans are forced to comply with ERISA, however, the crippling costs associated with doing so, including potential penalties, will not only harm employees, whose plans may be restructured or abandoned, but will ultimately harm the individuals who are served by these church-affiliated organizations.

For all of these reasons, the decisions of the Third, Seventh, and Ninth Circuits should be reversed.

ARGUMENT

I. THE DECISIONS BELOW REFLECT A FUNDAMENTAL MISUNDERSTANDING OF HOW MANY CHURCHES ARE STRUCTURED AND PERFORM THEIR MINISTRIES.

The Circuit Courts' narrow interpretation of ERISA's church plan exemption raises significant First Amendment concerns. The Circuit Courts failed to give those concerns serious consideration. The Seventh Circuit, for example, dismissed any such concerns altogether, stating that "[a] church can . . . establish a church plan for any of its affiliated organizations no matter what the religion or denomination, and that plan can be maintained by the church itself or maintained by a pension board or other outside organization." No.16-74 Pet. App. 28a. That dismissive statement fundamentally misapprehends the structure of non-hierarchical denominations like the UCC and the ELCA, where the disaggregated character of ecclesiastical polity could raise serious theological obstacles to any requirement that church-affiliated SMOs must establish their pension plans through a church.

The UCC is a Protestant Christian denomination with more than 5,000 churches and nearly one million members. The UCC was formed in 1957 with the union of two Protestant denominations: the Evangelical and Reformed Church and the Congregational Christian Churches. The Illinois Conference was in turn formed in 1964 through a consolidation of the North Illinois Synod of the Evangelical and Reformed Church and the Congregational Christian Conference of Illinois.

The UCC is a congregational church. "The basic unit of the [UCC] is the congregation. Members of each congregation covenant with one another and with God as revealed in Jesus Christ and empowered by the Holy Spirit. These congregations, in turn, exist in covenantal relationships with one another to form larger structures for more effective work." *What is the United Church of Christ?*, UCC, http://www.ucc.org/about-us_what-is-the-united-church-of (last visited Jan. 22, 2017).

A centralized, hierarchical structure would be anathema to the theology of the UCC. The UCC recognizes the "Priesthood of All Believers." "All members of the [UCC] are called to minister to others and to participate as equals in the common worship of God, each with direct access to the mercies of God through personal prayer and devotion." *Id.* Another core tenant of the UCC is "Responsible Freedom." "As individual members . . . we are free to believe and act in accordance with our perception of God's will for our lives. But we are called to live in a loving, covenantal relationship with one another—gathering in communities of faith, congregations of believers, local churches." *Id.* "Each congregation or local church is free to act in accordance with the collective decision of its members . . . [b]ut it also is called to live in a covenantal relationship with other congregations for the sharing of insights and for cooperative action." *Id.* "Likewise, associations of churches, conferences, the General Synod and the churchwide 'covenanted ministries' of the [UCC] are free to act in their particular spheres of responsibility" yet called upon "to live in a covenantal relationship with one another and with the local churches . . . to carry out God's mission in the world more effectively." *Id.*

Embodying the core beliefs of the UCC, CHHSM's "mission, on behalf of the entire church, is to sustain and advance the work of healing and service as a ministry of the church of Jesus Christ." *CHHSM History*, CHHSM, http://www.chhsm.org/heritage/history (last visited Jan. 22, 2017). CHHSM works to "support[] member organizations' transformation of the world through healing and mission ministries to make the world as right as God intends it to be." *Mission, Vision and Values*, CHHSM, http://www.chhsm.org/about/mission (last visited Jan. 22, 2017).

Reflecting the centrality of health and human services ministries to the UCC, CHHSM is an ecclesiastical body within the UCC. CHHSM's President and CEO sits, *ex officio*, on the Board of Directors of the UCC. CHHSM "was recognized by the Fifteenth General Synod as an organization composed of institutions and programs in health and welfare related to the [UCC] and accepted by the CHHSM as conforming to its standards." *Bylaws of the UCC*, art. VI, No. 293, UCC, http://www.ucc.org/ucc_constitution_and_bylaws (last updated July 2, 2015) (UCC Bylaws). Those standards include extending resources to serve and enhance the ministries of UCC congregations and their members; contributing their perspectives and resources to the work of the UCC Covenanted Ministries and the General Synod; and supporting one another in ongoing efforts to define and live out their UCC faith-based identity and fulfill their covenantal commitments within the UCC. *See id.* In order to be a member of CHHSM, "[t]he applicant ministry must be a [nonprofit] organization with an independent governance structure and budget" and must be formally recognized "by the [UCC] Conference in which its corporate headquarters is located." *See About*

CHHSM Membership, CHHSM, http://www.chhsm.org/about/membership (last visited Jan. 22, 2017).

These standards for affiliation reflect the purposes and functions of CHHSM, as set forth in the UCC Bylaws, which include: "[t]he support and nurture for its member institutions and programs in fulfillment of their ministries as part of the mission of the [UCC]" and "[r]epresentation of the ministries of [CHHSM's] member institutions and programs to the General Synod and [the UCC] Board in the conduct of the mission of the [UCC] in health and welfare." UCC Bylaws art. VI, No. 293.

Social ministry is also of fundamental importance to the ELCA, as expressed in the ELCA's Statement of Purpose: "To participate in God's mission, this church shall serve in response to God's love to meet human needs, caring for the sick and the aged, advocating dignity and justice for all people, . . . and standing with the poor and powerless and committing itself to their needs." *Constitutions, Bylaws, and Continuing Resolutions of the ELCA*, § 4.02(c), ELCA, http://www.elca.org/About/Churchwide/Office-of-the-Secretary/Constitutions (last visited Jan. 22, 2017) (ELCA Constitution). The ELCA Constitution provides that "[t]his church shall seek to meet human needs through encouragement of its people to individual and corporate action, and through establishing, developing, recognizing, and supporting institutions and agencies that minister to people in their spiritual and temporal needs." *Id.* § 8.23. The ELCA Bylaws further provide that "[t]hrough membership in [LSA] and the appropriate churchwide unit as designated by the Church Council, this church shall, with affiliated [SMOs], develop criteria for their ministries, establish affiliations and alliances within this church and

within society, and carry out a comprehensive social ministry witness." *Id.* § 8.23.01.

The ELCA is a "connectional" church in which authority is distributed rather than centralized. The ELCA Bylaws define the ELCA as the "whole church, including its three expressions: congregations, synods, and the churchwide organization." *Id.* § 1.01.01. These entities are "interdependent." The ELCA Constitution states: "[t]his church shall seek to function as people of God through congregations, synods, and the churchwide organization, all of which shall be interdependent. Each part, while fully the church, recognizes that it is not the whole church and therefore lives in a partnership relationship with the others." *Id.* § 8.11.

"Affiliation is the means by which the ELCA affirms that an SMO is integral to the church's mission and ministry." *Your [SMO's] Path to Affiliation with the [ELCA]* 6, ELCA, http://download.elca.org/ELCA%20Resource%20Repository/SMO_Path_to_Affiliation.pdf (last visited Jan. 22, 2017) (*Path to Affiliation*). "An affiliating SMO commits itself to the church's social ministry mission" and "[t]his ministry of service—a part of God's mission to the broken world—is essential to the church's meaning." *Id.*

Among its criteria for affiliation, the ELCA expects SMOs to: "publically acknowledge each other (e.g. SMO and synod);" offer educational opportunities for Lutheran congregations and communities to understand the needs of the people the SMOs serve, "and opportunities to partner with them in service;" "engag[e] in Lutheran theology and ELCA traditions . . . in order to ground the SMO's purpose and work;" and complete "a written agreement that articulates the SMO's relationship to the ELCA nationally." *Id.* at 7.

The ELCA's MCS plays a crucial role in linking particular SMOs, including Advocate, to the broader church. MCS's covenantal relationship with Advocate exemplifies this role. In the Covenantal Agreement, Advocate and the MCS make a range of promises reflecting their shared concerns for health and pastoral care. Advocate, for example, agrees to maintain a seat on its board for the MCS Bishop (JA42), as also provided in Advocate's bylaws (JA8), thereby giving MCS a governance voice. But ultimately the Covenantal Agreement is one of "shared ministry," in which both parties "commit to continue to work together to explore, identify, and pursue faithful and effective ways to promote the health and vitality of ELCA congregations, health care centers, communities, families, and individuals throughout greater Chicago." JA45. By their "shared commitment," Advocate and the MCS support each other in "living out Christ's command to serve the physical, emotional and spiritual needs of all," (JA45), including through quality health services and a robust program of pastoral care for patients, families, and staff, reflecting the promises Advocate made in gaining affiliation with the ELCA and membership in LSA.

LSA's mission statement reflects the ELCA's affiliation requirements: LSA "champions Lutheran social ministry by building valuable connections, amplifying our voices and empowering our members in their mission to answer God's call to love and serve our neighbor." *Mission, Vision & Values*, LSA, http://www.lutheranservices.org/mission (last visited Jan. 22, 2017). "LSA works to help the Lutheran social ministry system become a recognizable force of integrated, results-driven capacity harnessed to make a difference in God's name." *Path to Affiliation* 9.

Despite their differences in polity and organizational structure, both the UCC and the ELCA express their faith through social ministries. Petitioner Advocate through its affiliation with both churches has covenanted to participate in and serve that faith-based ministry.

Through its recognition by the Illinois Conference as a covenantal partner in health care ministry, Advocate is a member of CHHSM and is listed in the *UCC Yearbook*. Advocate's Covenantal Agreement with the Illinois Conference, which "affirm[s] their ministry in health care and the covenantal relationship they share with one another," expresses a "shared calling" for a "health care ministry" to "live out Christ's command to serve the physical, emotional, and spiritual needs of all, especially the 'least among us' (Matt. 25:40)." JA46, 52.

Advocate is also affiliated with the ELCA in accordance with ELCA's criteria. As mentioned, to "affirm their ministry in health care and the covenantal relationship they share with one another," Advocate entered into a Covenantal Agreement with MCS, recognizing a "shared mission" "rooted in a fundamental understanding of human beings as created in the image of God." JA40-41. In the Agreement, Advocate committed to "[p]ublicly affirm its affiliation with the ELCA," and the MCS committed to "publicly acknowledge Advocate as integral to the ministry of the ELCA." JA42-43. Advocate is listed in the ELCA Yearbook as among Lutheran SMOs "affiliated with the Evangelical Lutheran Church in America," on the MCS website as a covenantal partner with the MCS, and in the LSA SMO Directory.

No one could suggest that Advocate's affiliation with these church bodies is a casual act; Advocate has a

long history as a faith-based organization. Advocate was formed by the merger of the Evangelical Health Systems Corporation (EHS) and the Lutheran General HealthSystem (LGHS). EHS was founded in 1906 by the Evangelical Synod of North America to operate the German Evangelical Deaconess Hospital in Chicago. *History*, Advocate Health Care, http://www.advocatehealth.com/body_full.cfm?id=1869 (last visited Jan. 22, 2017). The Evangelical Synod is a predecessor of the church that through mergers became the UCC. LGHS was founded in 1897 as the Norwegian Lutheran Deaconess Home and Hospital, and in 1904 came under the control of the Norwegian Lutheran Church in America, which was a predecessor of today's ELCA. *Id.* Thus, Advocate traces its roots back more than a century to faith-based organizations that formed today's UCC and ELCA.

The Seventh Circuit acknowledged that Congress created the church plan exemption from ERISA "in order to prevent excessive government entanglement with religion." No.16-74 Pet. App. 3a. But although it recognized that Advocate is affiliated with the Illinois Conference of the UCC and the MCS of the ELCA, it downplayed the significance of those ties, noting that Advocate "is not owned or financially supported by either church" and "[t]here is no requirement that Advocate employees or patients belong to any particular religious denomination, or uphold any particular religious beliefs." *Id.* at 5a. These considerations miss the point. Decentralized churches place great theological significance in the independence or interdependence of the various church organizations, including the myriad SMOs that are granted affiliation to further the religious mission of the church. Providing care to patients of all faiths, through employees of all faiths, (or no faith at all) is itself an expression of faith.

Indeed, Advocate's Covenantal Agreement with the Illinois Conference recognizes a "shared calling" for a "health care ministry" to "live out Christ's command to serve the physical, emotional, and spiritual needs *of all*, especially the 'least among us' (Matt. 25:40)"—not just those who share a particular faith. JA52 (emphasis added).

From their commitments to provide faith-based social services, to their mutual relationships with specific ecclesiastical bodies, it is clear that the Illinois Conference, CHHSM, MCS, and LSA take seriously the "ministry" involved in affiliating with an SMO, such as Advocate. Extending such affiliation establishes a shared mission of a fundamentally religious nature.

II. ERISA'S CHURCH PLAN EXEMPTION DOES NOT IMPOSE A CHURCH-ESTABLISHMENT REQUIREMENT.

A. ERISA was Amended in 1980 to Broaden the Scope of the Church Plan Exemption.

The current definition of "church plan" is the result of a 1980 amendment to ERISA enacted pursuant to the Multiemployer Pension Plan Amendments Act, Pub. L. No. 96-364, § 407 (MPPAA). It is common ground that the amendment was intended to broaden the scope of the church plan exemption because of a conflict between existing law and the actual practice of many faith traditions, which resulted in the exclusion of many faith groups' pension plans from the church plan exemption. While ERISA has always contained an exemption for church pension plans, prior to the passage of the MPPAA, the statute defined an exempt "church plan" as "(i) a plan . . . maintained for its employees by a church or by a convention or

association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1954, or (ii) a plan described in subparagraph (C)." 29 U.S.C. § 1002(33)(A) (1974).

Subparagraph C conferred church plan status on existing plans established and maintained for the employees of a church and "one or more agencies of such church." *Id.* § 1002(33)(C) (1974). The original church-agency provision in Subparagraph C included a sunset clause with an expiration date in 1982.[4] *Id.*

In 1977, the IRS created a groundswell of criticism from religious organizations and others when, relying on this prior definition of "church plan," it determined that a pension plan established by orders of Catholic sisters for the employees of their hospitals did not qualify for the church plan exemption. The IRS concluded that the Catholic religious order was not part of a church because the operation of health care facilities was not, according to the IRS, sufficiently "religious." *See* IRS Gen. Couns. Mem. 37,266, 1977 WL 46200, at *1 (Sept. 22, 1977) ("We believe that because the principal activity of the orders is the operation of hospitals and because such activity is not religious in nature . . . . the orders are not 'churches' and thus their pension plans are not 'church plans'"). Numerous groups objected to the "intrusion of the [IRS] into the affairs of church groups and their agencies, by presuming to define what is and what is not an integral part of these religious groups' mission," in "violation of the principle of separation of church

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[4] ERISA included amendments to the Internal Revenue Code of 1954, which defined the term "church plan" in identical terms for tax and PBGC insurance purposes. 26 U.S.C. § 414(e) (1974); 29 U.S.C. § 1321(b)(3) (1974).

and state." 125 Cong. Rec. 10,054-58 (1979) (letters entered into the Congressional Record). The MPPAA responded directly to these concerns. *See infra* at 19-21.

B. The Text of the Statute Provides that Plans Established by Church-Affiliated Organizations Qualify for the Church Plan Exemption.

"Statutory interpretation . . . begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). The text of the church plan exemption, as amended in 1980 by the MPPAA, indicates that plans established and maintained by church-affiliated organizations can qualify for the church plan exemption.

ERISA does not apply to "any employee benefit plan if . . . such plan is a church plan (as defined in section 3(33)." 29 U.S.C. § 1003(b)(2). In relevant part, section 3(33) provides that "[t]he term 'church plan' means a plan established and maintained . . . by a church or by a convention or association of churches which is exempt from tax under section 501" of the Internal Revenue Code of 1986. 29 U.S.C. § 1002(33)(A). Subparagraph C then clarifies the scope of the church plan exemption by providing, in relevant part, that for purposes of section 3(33):

> [a] plan established and maintained . . . by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program . . . for the employees of a church or a convention or association of churches, if such organization is controlled by

> or associated with a church or a convention or association of churches.

29 U.S.C. § 1002(33)(C)(i).[5] Accordingly, ERISA defines a "church plan" as a plan "established and maintained . . . by a church," and then clarifies that a "plan established and maintained . . . by a church . . . includes a plan maintained by an organization . . . [that] is controlled by or associated with a church." 29 U.S.C. §§ 1002(33)(A), (C)(i). The language and structure of the definition of church plan reflect that Congress intended 29 U.S.C. § 1002(33)(C)(i) to broaden the definition of church plan set forth in 29 U.S.C. § 1002(33)(A) to include plans established and maintained by entities that are "controlled by or associated with a church or a convention or association of churches." *See* Brief for Petitioners at 20-30.

This conclusion is buttressed by 29 U.S.C. § 1002(33)(C)(ii), which provides in relevant part that "[t]he term employee of a church . . . includes . . . an employee of an organization . . . which is controlled by or associated with a church." There is no dispute that Congress intended to allow: (1) employees of church-affiliated organizations to be covered by church plans; and (2) church-affiliated organizations to maintain church plans. Given this, Congress had no reason to require that a church *establish* a plan when that plan would be maintained by a church-affiliated organization for the organization's own employees. Thus, the Circuit Courts plainly erred in reading such a puzzling intent into the statutory language.

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[5] The parallel provisions under the Internal Revenue Code of 1986 (as amended) include the same language. *See* 26 U.S.C. § 414(e)(3)(A).

C. The Legislative History Indicates that Congress Intended the Church Plan Exemption to Include Plans Established by Church-Affiliated Organizations.

The legislative history demonstrates that Congress intended the church plan exemption to apply to plans established and maintained by church-affiliated organizations. As set forth above, the MPPAA was enacted in the wake of an IRS finding that a plan established and maintained by religious orders to cover hospital employees did not qualify for the church plan exemption because the work of caring for the sick was not "religious." *See supra* at 16-17.

The concerns with the statute and the IRS's interpretation were twofold. *First*, churches were concerned that "ERISA seem[ed] to require a determination as to what type of entity can properly be termed a part of the church by the courts or at an administrative level, which would be in violation of the first amendment rights granted to religious organizations." *Hearings Before the Subcomm. on Private Pension Plans and Emp. Fringe Benefits*, 96th Cong., 1st Sess. 375 (1979) (Statement of John Ordway, Executive Vice President, UCC Pensions Board). *Second*, churches were concerned that the statute failed to recognize how the diverse array of faith groups actually operated. As Mr. Ordway stated in his testimony:

> A church, as an entity, is very different from the traditional corporate entity. The traditional corporations normally ha[ve] a . . . large number of employees . . . and a centralized form of management. . . . The church on the other hand is made up mostly of small work

> units, some of which might be agencies under ERISA and others may be classified as churches by ERISA. But all of which are a part of the church as far as our own determination is concerned.

Id.; *see also id.* at 387 (Statement of the Church Alliance for Clarification of ERISA) (noting that "because of the close relationship that exists between churches and their affiliated agencies, it is essential that the employees of the agencies be eligible for coverage," and that "[e]xamples of church agencies would be any of the following organizations which is affiliated with a church . . . a hospital, a school or college, a nursing home, a retirement home, a drug-abuse center, or a children's home or camp").

In response to these concerns, Congress recognized that the MPPAA amendments were needed to address the conflict between the existing law and the actual practice of many faith traditions that carry out their mission through a variety of church-affiliated organizations. Congress recognized that the definition of church plan did "not take into account . . . the structural differences of our denominations" or the fact that "church agencies are parts of the church in its work of disseminating religious instruction and caring for the sick, needy, and underprivileged." 124 Cong. Rec. 12,107 (1978). Importantly for non-hierarchical denominations, Congress also recognized that "[i]n the congregational type of denomination, the local churches and agencies are self-governing. Unlike corporate structures, no lines of authority exist from the denomination." *Id.* This legislative history supports the conclusion that Congress amended ERISA in order to expand the scope of the church plan exemption to include plans established by church-affiliated

organizations. The Circuit Courts' interpretation of the church plan exemption is not in line with the legislative history.

III. LONGSTANDING AGENCY INTERPRETATIONS RECOGNIZING THAT THE CHURCH PLAN EXEMPTION APPLIES TO PLANS ESTABLISHED BY CHURCH-AFFILIATED ORGANIZATIONS DESERVE SUBSTANTIAL DEFERENCE AND AVOID CONSTITUTIONAL CONCERNS.

A. The IRS, DOL, and PBGC Have Consistently Interpreted the Church Plan Exemption to Include Plans Established by Church-Affiliated Organizations.

For the nearly 35 years since the MPPAA amendment to the "church plan" definition, the IRS, DOL, and PBGC have repeatedly demonstrated their understanding that the "church plan" definition includes plans established by a wide range of church-affiliated organizations, which reflect a diverse array of ecclesiastical relationships. Beginning in 1982, just two years after the church plan exemption was amended by the MPPAA, the General Counsel of the IRS issued a memorandum interpreting the effect of the MPPAA on its prior reading of the church plan exemption.[6] IRS Gen. Couns. Mem. 39,007, 1983 WL 197946, at *1 (Nov. 2, 1982) (finding it "necessary to reconsider [an earlier memorandum interpreting the church plan exemption] in the light of amendments made . . . by the [MPPAA]"). The IRS has consistently relied on the

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[6] As set forth *supra* at 15-17, 19-21, it was this prior interpretation that led to the enactment of the MPPAA.

interpretation set forth in the 1982 memorandum to issue more than 500 opinion letters granting church-affiliated organizations a church plan exemption, including each of the Petitioners. No.16-74 Pet. App. 70a-111a. The DOL has similarly issued dozens of advisory opinions interpreting the church plan exemption to cover plans established by church-affiliated organizations. *Id.* at 64a-69a. The PBGC has also adopted the IRS's interpretation of the church plan exemption "[t]o ensure uniform administration of" ERISA. *See* PBGC Op. Ltr. 78-1 (Jan. 5, 1978).

Despite this unanimous regulatory consensus of nearly 35 years, the Circuit Courts declined to defer to the agencies' longstanding interpretation. No.16-86 Pet. App. 22a-23a; No.16-74 Pet. App. 24a-26a; No.16-258 Pet. App. 18a-20a. But deference is warranted.

This Court has long recognized that agency interpretations "constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). "[A]n agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *U.S. v. Mead Corp.*, 533 U.S. 218, 234 (2001) (citation omitted). This is particularly true where, as here, the agencies' "interpretations and practices . . . involve the contemporaneous construction of a statute and where they have been in long use." *Davis v. U.S.*, 495 U.S. 472, 484 (1990) (citation omitted).

This Court has recognized that "an administrative 'practice has peculiar weight when it involves a contemporaneous construction of a statute by the persons charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Zenith Radio Corp. v. U.S.*, 437 U.S. 443, 450 (1978) (citation omitted); *see also Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740 (1996) ("[A]gency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist.").

Deference to the regulator's interpretation of a statute is appropriate even when the agency's interpretation is only one of several reasonable interpretations. In *Zenith Radio*, for example, the Court explained that "'[t]o sustain an agency's application of a statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'" 437 U.S. at 450-51 (citation and internal alterations omitted). And the fact that the agency adopted its position a year after the statute was enacted and had consistently maintained it for more than 80 years also entitled the agency's interpretation to "considerable weight." *Id.* at 450; *see also U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001) (faced with two plausible interpretations of a provision of the Internal Revenue Code, the Court deferred to the IRS's "steady interpretation of its own 61-year-old regulation implementing a 62-year-old statute").

Here, the IRS, DOL, and PBGC have consistently interpreted the church plan exemption to cover plans established by church-affiliated organizations. This

interpretation is consistent with both the statutory text and legislative history. *See supra* Part II. "Th[e] agency view, overlooked by the [] Circuit[s] . . . merits the Judiciary's respectful consideration." *Yates v. Hendon*, 541 U.S. 1, 20-21 (2004).

B. Church-Affiliated Organizations Have Reasonably Relied on the Agencies' Interpretation of the Church Plan Exemption.

Deference to the agencies' interpretation is also appropriate because churches and church-affiliated organizations have reasonably relied on the guidance provided by the IRS, DOL, and PBGC for nearly 35 years and have structured their pension plans accordingly. "In light of these substantial reliance interests, the longstanding administrative construction of the statute should 'not be disturbed except for cogent reasons.'" *Zenith Radio*, 437 U.S. at 457-58 (citation omitted); *see also K. Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 312 (1988) (Brennan, J., concurring in relevant part) ("We do not lightly overturn administrative practices as longstanding as the ones challenged in this action. This is particularly true where, as here, an immense . . . industry has developed in reliance on that consistent interpretation.").

In *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), the Court held that a 2011 DOL regulation that reversed the DOL's longstanding interpretation of a provision of the Fair Labor Standards Act was not entitled to *Chevron* deference in part due to the reliance of businesses on the DOL's prior interpretation. 136 S. Ct. at 2126. The Court noted that the "industry had relied since 1978" on the DOL's interpretation. *Id.* at 2123, 2126. In reliance of the DOL's interpretation, businesses "negotiated and

structured their compensation plans," and "[r]equiring [them] to adapt to the [DOL's] new position could necessitate systemic, significant changes to [their] compensation arrangements." *Id.* at 2126. Moreover, the DOL's about-face exposed businesses "whose service advisors [were] not compensated in accordance with the [DOL's] new views" to "substantial FLSA liability." *Id.* The DOL's explanation for its departure from its well-established interpretation "fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position," particularly "because of decades of industry reliance on the [DOL's] prior policy." *Id.*

Similarly, the Circuit Courts below failed to take into account the serious reliance interests that have developed as a result of the agencies' longstanding interpretation of the church plan exemption. The Circuit Courts ignored the fact that hundreds of church-affiliated organizations have structured their employee benefit plans in direct reliance on private letter rulings from the IRS and advisory opinions from the DOL, and that thousands more have likely done so based on their understanding of the law as reflected in the agency interpretations. As set forth in greater detail below, *infra* at 32-34, were the Circuit Courts' narrow interpretation of the church plan exemption permitted to stand, church-affiliated organizations that established a plan in reliance on the agencies' guidance, but find themselves no longer covered by the church plan exemption, will be forced to fundamentally restructure (or scrap) their employee benefit plans. Moreover, they will face the potential for ruinous liability for having failed to comply with ERISA for years, if not decades, even though their noncompliance was based on explicit regulatory guidance that they were *not required* to comply. This will

unfairly harm both church-affiliated organizations and their employees. It will also harm the people served by church-affiliated organizations, which may be forced to close or dramatically reduce their operating budgets—and their ministries—in order to comply with ERISA.

C. The Agencies' Interpretation of the Church Plan Exemption Avoids Constitutional Concerns.

The agencies' more expansive interpretation of the church plan exemption also deserves deference because it avoids the constitutional concerns raised by the interpretation adopted by the Circuit Courts below. The doctrine of constitutional avoidance teaches that "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). As the Court stated in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988):

> "[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like the Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume

> that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

485 U.S. at 575 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). The doctrine of constitutional avoidance is "thus a means of giving effect to congressional intent, not of subverting it." *Clark*, 543 U.S. at 382. As set forth in Part II, the agencies' more expansive view of the church plan exemption is not only a plausible reading of the statutory text, but is supported by legislative history. It also avoids the "'grave [constitutional] doubts'" engendered by the approach advocated by the Respondents and taken by the Circuit Courts below. *Almendarez-Torres v. U.S.*, 523 U.S. 224, 237 (1998) (citation omitted).

First, the agencies' interpretation of the church plan exemption avoids creating a preference for certain types of ecclesiastical arrangements, which would raise serious concerns under the First Amendment. *Larsen v. Valente*, 456 U.S. 228, 244-45 (1982). The MPPAA was motivated in part by concerns that the pre-1980 church plan exemption "fail[ed] to recognize that the church agencies are parts of the church in its work of disseminating religious instruction and caring for the sick, needy, and underprivileged" and failed to recognize the differences between hierarchical and non-hierarchical denominations. 124 Cong. Rec. 12,107; 125 Cong. Reg. 10,052. The MPPAA, by contrast, was designed to "accommodate[] the differences in beliefs, structures, and practices among our religious denominations." 124 Cong. Rec. 12,107.

While a hierarchical church may be able to "establish a church plan for any of its affiliated organizations," No.16-74 Pet. App. 28a, non-hierarchical denominations often have sincere theological objections to

requiring such centralization, or may not be structured to establish a church plan for agencies. There are many variations in how churches are structured and governed. The Circuit Courts' narrow interpretation of the church plan exemption would favor certain religions over others, and thus invite serious scrutiny under the First Amendment's Religion Clauses. *See, e.g.*, *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008). The agencies' interpretation, by contrast, allows all denominations to use the church plan exemption.

Second, the agencies' interpretation does not require the government to evaluate the "religiousness" of a particular entity, and therefore avoids an "unconstitutionally intrusive scrutiny of religious belief and practice." *Id.* at 1250. The narrow interpretation advocated by Respondents and adopted by the Circuit Courts would require courts and agencies to decide whether the organization is "religious" enough to be considered a church and thus eligible for the church plan exemption—precisely the constitutionally dubious morass reflected in the 1977 IRS ruling that led to the enactment of the MPPAA. Such an inquiry into "what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977). Moreover:

> it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets

> and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336 (1987).

Consider for example a church-affiliated homeless shelter that is open to people of all faiths. The shelter has prayer before meals, two chaplains who visit daily with the residents, and daily worship that is open to all who wish to attend. In addition, the shelter sponsors a choir of its residents, and the choir regularly performs at churches and other religious gatherings. Should the shelter be deemed a church under Respondents' interpretation of the statute?

As set forth above, Petitioner Advocate is formally recognized by the Illinois Conference of the UCC and affiliated with the ELCA and its MCS, based on covenantal agreements to participate in a shared "health care ministry." *Supra* at 13-15. In these cases, the Circuit Courts placed significant weight on the fact that the Petitioners perform services that are comparable to those offered by analogous secular entities. But that analysis risks imposing a standard of "adequate religiosity." Under that approach, SMOs could be evaluated on the extent to which they serve and hire only members of their own faith, and offer services explicitly containing religious content.[7] For some

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[7] The interpretation advanced by the Circuit Courts fails to give proper weight to the fact that SMOs like Petitioner Advocate are required to go through a multi-step process to become affiliated with a church, including being formally recognized by a church. *Supra* at 9-14. And the Circuit Courts also wrongly focused on the fact that Petitioners provide health care services

faith traditions, however, including those represented in this brief, the religious duty to provide healing and care extends to all, not merely members of the faith, and is not offered on condition that recipients participate in religious activities. Such an approach to social ministry deserves equal respect with those where explicitly religious images or practices are more visible.

Under the agencies' longstanding approach, the agencies and the courts are only required to examine the relationship between a church and the organization at issue, a less intrusive but still meaningful test that focuses on whether the organization is actually affiliated with a church. *See, e.g.*, *Lown v. Continental Cas. Co.*, 238 F.3d 543 (4th Cir. 2001). This standard enables courts and agencies to safeguard against abuse while avoiding the First Amendment concerns that would be posed by the Circuit Courts' interpretation.

IV. THE RECORD IS DEVOID OF EVIDENCE DEMONSTRATING THAT THE EMPLOYEES OF CHURCH-AFFILIATED ORGANIZATIONS WOULD BE BETTER PROTECTED IF THE CHURCH PLAN EXEMPTION IS NARROWED.

The standard adopted by the Circuit Courts creates a host of problems, but the record lacks any showing that it alleviates a pervasive problem. It is far from clear that the employees of church-affiliated organizations would be better protected if the church plan exemption is narrowed and those entities are brought within the scope of ERISA.

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that are also available from secular hospitals. *See, e.g.*, No.16-74 Pet. App. 3a-6a; No.16-86, Pet. App. 17a n.8.

First, church plans that qualify for the ERISA exemption are not free from regulation. Both federal and state regulations provide employees in church plans with meaningful protections. For example, in order to be a tax-qualified plan under the Internal Revenue Code of 1986 (as amended), exempt church plans must include numerous protections for plan participants. *See, e.g.*, 26 U.S.C. §§ 401(a)(2), (26) (exclusive benefit rule and minimum participation requirements). Church plans exempt from ERISA must also comply with certain pre-ERISA requirements of the Internal Revenue Code. *See, e.g.*, 26 U.S.C. § 401(a)(7) (as in effect on Sept. 1, 1974) (minimum funding and vesting requirements). State statutes regulating the conduct of trustees and state common law standards provide further protections. *See, e.g.*, Illinois Trusts and Trustees Act, 760 ILCS 5/1 *et seq.* (rules regarding trustee conduct); Jeffrey A. Herman, *Resolving ERISA's "Church Plan" Problem*, 31 A.B.A. J. LAB. & EMP. L. 231, 233 (2016) (common law standards).

Second, there is no evidence that ERISA-exempt church plans have failed on a widespread basis. Instead, the record reflects only a few isolated defaults by exempt church plans, unlike the many defaults by non-church plans. Although the Seventh Circuit stated that the *amicus curiae* briefs were "replete with examples" of hospitals that acquired church plan exemptions and then left their employees with underfunded pensions, No.16-74 Pet. App. 17a, the relevant *amicus curiae* briefs identify only three defaults between 1998 and 2013. Those briefs also lack any information to suggest that the church-establishment requirement would have prevented those insolvencies. *See* Brief of Americans United for Separation of Church and State, American Civil Liberties Union,

and ACLU of Illinois as *Amici Curiae* in Support of Appellees and Affirmance 9-10; Brief of the Pension Rights Center as *Amicus Curiae* in Support of Plaintiff-Appellee and Affirmance 11.

Furthermore, the record fails to show that church plans are underfunded or more vulnerable to default than plans established by for-profit corporations, which have themselves faced significant insolvencies. The record is also devoid of any evidence to establish that beneficiaries under church plans would fare better if their benefits were insured by the PBGC, which—due to its own financial constraints[8]—has regularly paid ERISA plan beneficiaries substantially less than their plans promised.[9]

Third, if the underlying decisions are affirmed, church-affiliated organizations around the country will be forced to bear the crippling costs of ERISA compliance, massive class action litigation expenses, and potentially billions of dollars in penalties. For example, church-affiliated organizations would have to restructure their participation, vesting, and accrual

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[8] *See* 29 C.F.R. § 4022.22(a) (discussing the maximum insurable benefit available to a plan beneficiary if a plan covered by the PBGC becomes insolvent); Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1106-07 (1988) (noting that the PBGC program is "inherently unstable"); *High-Risk Series, An Update*, U.S. Government Accountability Office 335 (2015), http://www.gao.gov/assets/670/668415.pdf (stating that the "financial future" of the PBGC is "uncertain" due to the PBGC's staggering financial deficit).

[9] *See Pension Insurer Expects to be Out of Funds by 2022*, Committee for a Responsible Federal Budget, Blog (July 3, 2014), http://crfb.org/blogs/pension-insurer-expects-be-out-funds-2022 (noting that the beneficiaries of failed plans receive benefits at a much lower level from the PBGC).

rules to comply with ERISA. *See* 29 U.S.C. §§ 1052, 1053, 1054. Defined-benefit plans would also be required to pay hefty premiums to the PBGC. *See* 29 U.S.C. § 1301 *et seq*.[10]

The staggering costs of ERISA compliance, massive class action litigation, and potential penalties could "lead to corporate restructurings, layoffs, mergers or bankruptcies."[11] These costs could also force some church-affiliated employers to abandon defined-benefit pension plans altogether.[12] As Senator Talmadge presciently stated when arguing in favor of the 1980 ERISA amendments:

> Church agencies are essential to the churches' mission. They are for the sick and needy and disseminate religious instruction. They are, in fact, part of the churches. As a practical

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[10] *See also Increasing Pension Premiums: The Impact on Jobs and Economic Growth*, U.S. Chamber of Commerce 3 (May 2014), https://www.uschamber.com/report/increasing-pension-premiums-impact-jobs-and-economic-growth (discussing multi-billion-dollar premium increases imposed by the PBGC).

[11] Mark Casciari & Jennifer Neilsson, *Thoughts on Church Plan Status After Kaplan v. Saint Peter's Healthcare System*, ERISA & Employee Benefits Litigation Blog (Jan. 13, 2016), http://www.erisa-employeebenefitslitigationblog.com/2016/01/13/thoughts-on-church-plan-status-after-kaplan-v-saint-peters-healthcare-system/

[12] The burdens and costs associated with ERISA compliance have been identified as the key factors in the decline of defined-benefit plans. *See* Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 FLA. TAX REV. 607, 614-15 (2000); Barbara A. Butrica, et al., *The Disappearing Defined Benefit Pension and its Potential Impact on the Retirement Incomes of Baby Boomers*, 69 SOC. SECURITY BULL. 1 (2009) https://www.ssa.gov/policy/docs/ssb/v69n3/v69n3p1.pdf

> matter, it is doubtful that the agency plans would survive subjection to ERISA.

125 Cong. Rec. 10,052.

Fourth, forcing church-affiliated organizations to comply with ERISA will necessarily leave those organizations with fewer resources to carry out their ministries and provide services to "the sick, needy, and underprivileged." 124 Cong. Rec. 12,107. Most church-affiliated organizations, like most non-profits, have limited resources. Requiring them to shoulder the additional costs of complying with ERISA will likely force many to make the difficult choice between complying with ERISA and dramatically reducing their operating budgets or shutting down entirely. Either way, it will be the employees of the church-affiliated organizations and the people they serve who will be harmed.

CONCLUSION

For all of the foregoing reasons, the decisions of the Third, Seventh, and Ninth Circuits should be reversed.

Respectfully submitted,

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